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**BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON**

**UNION BAY PRESERVATION  
COALITION,**

**Appellant,**

**v.**

**COSMOS DEVELOPMENT &  
ADMINISTRATIVE CORP., CITY  
OF SEATTLE, and STATE OF  
WASHINGTON DEPARTMENT OF  
ECOLOGY,**

**Respondents.**

**SHB NO. 92-51**

**ORDER DENYING  
MOTION TO DISMISS**

**I**

The Shorelines Hearings Board that heard this case in September 1993, was comprised of five members. The sixth member, former Chairman, Harold Zimmerman, resigned at the end of July 1993.

**II**

The Board, on December 22, 1993, sent the parties a letter explaining that it was extending the period for rendering its final decision, until January 31, 1994, for good cause.

**III**

RCW 34.05.461(8) provides that:

*Initial or final orders shall be served in writing ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings in accordance with subsection (7) of this section unless this period is waived or extended for good cause (emphasis added).*

**ORDER DENYING MOTION  
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#### IV

The Shorelines Hearings Board is comprised, by statute, of six members.

RCW 90.58.170. Three of those members are members of the Pollution Control Hearings Board Id. The Pollution Control Hearings Board members are appointed by the Governor.

RCW 43.21B.020. Mr. Zimmerman, was one of the members of the Pollution Control Hearings Board. A decision of the Shorelines Hearings Board must be agreed upon by four members to be final. RCW 90.58.170.

#### V

The Board found that good cause existed, on December 22, for the extension, because:

1) there was not an agreement by four members on a final decision in this case; and 2) the vacancy on Shoreline Hearings Board had not been filled by the Governor. Because of the nature of the divided opinion on the Board, the Board determined that the inclusion of a sixth member would affect the final decision in this case.

#### VI

The Board extended the deadline for rendering a decision until January 31, upon the hopes that the Governor would appoint a new member in time for the Board to reach a final decision by that date. The Board stated at the time of that extension, that the then five member Board would render its decision, if the Governor had not made the appointment within the above time frame.

#### VII

The Governor did not make the appointment within that period; therefore, the Board, still being deadlocked decided not to render its decision by January 31. Rather, the Board chose to grant a second extension, for good cause; until the Governor had filled the position, and the new member had an opportunity to adequately review the record.

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2 **VIII**

3 The permittee, Cosmos Development & Development Corp. ("Cosmos"), filed its  
4 Motion to Dismiss Union Bay's Appeal, on February 8, 1994. Accompanying the motion was  
5 the Declaration of Oscar Del Moro, the development manager for Cosmos, alleging financial  
6 prejudice from the Board's delay of rendering a decision.

7 **IX**

8 The appellant, Union Bay Preservation Coalition ("UBPC"), filed its written response  
9 and a motion to strike the declaration of Mr. Del Moro. Cosmos subsequently filed a reply.

10 **X**

11 The Governor has filled the vacant position on the Pollution Control Hearings Board.  
12 The new member will commence his duties as a member of that Board and the Shorelines  
Hearings Board, on March 28, 1994.

14 **XI**

15 The Board followed its own precedent, in granting the extension for rendering its  
16 decision. The only case cited where the Board delayed a decision to obtain a sixth vote, and  
17 the only case of which the Board is aware, is Washington Environmental Council v. Douglas  
18 County, SHB Nos. 86-34, 86-36 & 86-39 (1988). There the Board, as here, was split three to  
19 two, such that a sixth vote could have made a difference in the outcome. The only difference  
20 between the cases is that the vacancy there was of a cities' representative to the Board; as  
21 opposed to a member of the Pollution Control Hearings Board. The Board obtained a cities"  
22 representative, who reviewed the record and enabled the Board to reach a final decision.

23 **XII**

24 Cosmos relies on Department of Ecology v. Kirkland, 84 Wn.2d 25, 523 P.2d 1181  
25 (1974), for its argument that the Board is required to render a decision in the absence of a

1  
2 sixth member. That case does not apply to this case, because the Board there was composed  
3 of six members. The problem was that they had split three-to-three. The Court reasoned that  
4 this constituted a final decision affirming local government, despite the language of the  
5 Shoreline Management Act that four members must concur in a final decision. The Court  
6 reached a practical result in that case. It would have unnecessarily interfered with the Board's  
7 decision-making process, to have remanded the case back to the same six members and ask  
8 them to come up with a different decision. The Court noted that, by the time the appeal  
9 reached it, there had been some change in membership in the Board. This factor was wisely  
10 rejected by the Court, because a judicial decision on such a question, should not depend on the  
11 exigencies of the time it considers the appeal, but rather the circumstances at the time the  
12 Board rendered its decision. Here, unlike Kirkland, a full Board has not had the opportunity  
3 to consider the record in this case. The five members that have considered the case have not  
14 reached a decision which could not be changed by the inclusion of a sixth member. If the full  
15 Board were to reach a three-to-three decision, that would qualify as a final decision under  
16 Kirkland. The present three-to-two split does not.

### 17 XIII

18 Cosmos also points to the Board's regulations as a basis for its conclusion that four  
19 members need not concur to have a final decision. The regulation, WAC 461-08-235 does not  
20 support that argument. The regulation is aimed at cases where an initial decision is made by  
21 the Board. That process was not employed in this case. Moreover, that regulation's  
22 application is dependent upon a full Board deciding the case. WAC 461-08-235. Finally, it  
23 simply applies the rule of the Kirkland case, in those situations when a full Board can not  
24 reach a four vote majority decision.

1  
2 **XIII**

3       There is an important reason underlying this Board's determination; namely, that it is  
4 not likely that the Legislature intended to require an appellant to convince 80 percent of the  
5 Board members of its position (four out of five), in order to prevail. The 67 percent  
6 requirement, in regards to a full Board, is express. It is the closest thing to a majority, in a six  
7 member configuration. We believe to infer a super majority in the Board's decision-making  
8 process, by requiring it to decide a case with less than its full membership, would unfairly  
9 undo the delicate balance that was struck when the people passed the Shoreline Management  
10 Act as a state wide initiative.

11 **XIV**

12       Based on the foregoing analysis, the Board issues this:  
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2 **ORDER**

3 The motion to dismiss is denied. The Board will consider the record with its full  
4 membership, on April 11, 1994. The Board will thereafter render its final decision.

5 DONE this 25<sup>th</sup> day of March, 1994.

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7 **SHORELINES HEARINGS BOARD**

8   
9 ROBERT V. JENSEN, Presiding Officer

10   
11 RICHARD C. KELLEY, Member

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13 BOBBI KREBS-MCMULLEN, Member

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15 DAVE WOLFENBARGER, Member

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18 MARK ERICKSON, Member

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27 **ORDER DENYING MOTION  
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